NO. 48489-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL RAY HORN,

Appellant.

RESPONDENT'S BRIEF

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1. Did the trial court abuse its discretion in excluding irrelevant and unduly prejudicial evidence of events that transpired after the crimes?

2. Was the trial court required to consider the appellant's past, present, and future ability to pay prior to its imposition of the mandatory victim assessment fee and the mandatory DNA collection fee?

II. SHORT ANSWERS

1. No. The trial court did not abuse its discretion in excluding irrelevant and unduly prejudicial evidence of events that transpired after the crimes.

2. No. The trial court was not required to consider the appellant's past, present, and future ability to pay prior to its imposition of the mandatory victim assessment fee and the mandatory DNA collection fee.

III. FACTS

A couple years before January 2015, Suzie Oubre met the appellant at a bar, the Moose Lounge, in downtown Woodland, WA. They were members of the Moose Lounge and met regularly at the bar to drink and

socialize as acquaintances. The appellant was never violent and was always very calm, nice, and polite. Transcript, p. 132-136 and 139.

Ms. Oubre was a registered respiratory therapist for Peace Health Southwest Washington Medical Center and owned a debt restructuring and commercial lending business. Transcript, p. 129-130. The appellant took care of an 80 acre farm and owned a landscaping business. The appellant started the landscaping business 30 years ago, was self-employed, and often did the landscaping work by himself. The appellant's landscaping work ranged from small to big heavy projects. Transcript, p. 134, 521, 593-594, 623, 628, and 633-634. The appellant worked a lot of landscaping projects in the summer of 2015. Transcript, p. 598.

After she got to know the appellant, Ms. Oubre hired the appellant to do several landscaping projects on her rental properties and home. Ms. Oubre lived on a two acre property in the country in Woodland, WA, about five to five and a half miles out of town. Her home was secluded and did not have neighbors located close by. Ms. Oubre hired the appellant to remove two 40 feet trees, landscape her properties, and move 40 tons of rock round her residence. Transcript, p. 122-129, 134-135, 137-138, 287-288, 291, and 331.

When they first met, both Ms. Oubre and the appellant were involved in separate romantic relationships. Ms. Oubre was in a 17 year

relationship that was nearing an end and the appellant was dating a very abusive girlfriend who used drugs. Ms. Oubre and the appellant had an affair sometime in 2014 and dated openly towards the end of 2014. Prior to January 2015, there was no violence or abuse in their relationship. Transcript, p. 131-137, 139, 518, 525, and 617-622. Ms. Oubre and the appellant lived separately at their respective residences, about a mile or a mile and a quarter apart. Transcript, p. 138.

Problems first arose in their relationship towards the end of January 2015 when the appellant accused Ms. Oubre of texting and talking to her ex. The appellant was angry over Ms. Oubre's ex keeping his stuff at her house. The appellant grabbed and ripped Ms. Oubre's nightshirt, hit her in the chest, and threw her onto the bed at her residence. Fearing that her tenant downstairs would hear and witness their argument, they left her residence and went to the appellant's cabin. At the cabin, the appellant refused to let Ms. Oubre leave, grabbed and wrestled with her, took her keys, knocked her to the ground, bit her on the back, and manhandled her. She stood 5'7 and weighed 140lbs. The appellant stood 6', weighed 196lbs, and was much stronger than Ms. Oubre. Ms. Oubre was overmatched physically by the appellant and was unable to leave the appellant's cabin. The incident caught her off guard because she had never experienced anything like that before. She did not call the police but

took photos to document her injuries that day. Transcript, p. 141-151, 580, and 635-636.

The January 2015 incident scared Ms. Oubre and caused her to end their relationship. Transcript, p. 150-151. Sometime in February 2015, Ms. Oubre and the appellant got back together because the appellant begged her to come back, promised the January 2015 incident would not happen again, and was apologetic and very nice to her. Transcript, p. 151 and 154-155. Despite getting back together, the January 2015 incident was always in the back of her mind. Transcript, p. 151-154.

In August 2015, Stacy Stenerson and Laurie Ramsey temporarily rented the downstairs of Ms. Oubre's residence for a work project they did for Peace Health and stayed at the residence for approximately 15 days. On August 2, 2015, Ms. Stenerson moved into the residence. People living and visiting the residence parked in the driveway because the garage was full. Transcript, p. 122-129 and 198-199.

While Ms. Oubre loved the appellant and wanted things to work between the two of them, she came to realize that her relationship with the appellant was not going to work out because the appellant became increasingly jealous and controlling over time, making it increasingly hard for her to work. Transcript, p. 155-157, 164-170, and 303-309. The appellant for the most part was very sweet and nice, and the relationship

was great 95% of the time, but the appellant was dangerous the remaining 5% of the time. Transcript, p. 139 and 310. Ms. Oubre referred to the appellant as Bo-Bo when he got angry, jealous, aggressive, and abusive, and she was scared of Bo-Bo. Transcript, p. 151-152 and 164-165.

On August 4, 2015, Ms. Oubre attempted to break up with the appellant. She drove a long distance away and did not let him know her whereabouts because she was afraid of him. She sent several text messages to the appellant telling him the relationship was not working and they needed to break up. Transcript, p. 170-175 and 192-194. The appellant did not want the relationship to end and convinced Ms. Oubre to return. Transcript, p. 194-195 and 637-642.

On August 7, 2015, the appellant worked on some landscaping project all day and had some drinks after work. Transcript, p. 520 and 598. Ms. Oubre worked at the hospital and got home around 7:35 or 7:40 PM. Ms. Oubre called the appellant after work and realized he had been drinking, causing her to text the appellant around 7:40 PM that she did not want to be in the relationship anymore, that she was afraid of the appellant, and that he could not come to her residence that evening. Transcript, p. 195-197. Shortly after she got home, the appellant drove to her residence in his white Toyota pickup and parked in the driveway of her residence. He was nice and brought a bottle of wine and dinner. They spent the

evening drinking some wine and eating dinner together. Transcript, p. 122-129, 198-200, 339, 342, and 441. Ms. Oubre subsequently took the appellant's wallet and keys away from the appellant because she did not want him to drive home while under the influence of alcohol. Transcript, p. 297-298 and 611.

Around 10:45 PM that evening, Ms. Oubre and the appellant prepared for bed. When the appellant saw Ms. Oubre playing on her cellphone, he became very angry and accused her of texting and talking to her ex. An argument ensued causing Ms. Oubre to tell the appellant the relationship was over. Transcript, p. 201-206. As Ms. Oubre went to get dress, the appellant grabbed and ripped her bra in the master bathroom. In response, Ms. Oubre hit the appellant in the chest a couple of times. The appellant proceeded to punch Ms. Oubre in the eye with a fist and knocked her across the master bathroom floor. The appellant's punch prevented Ms. Oubre from seeing straight and caused a bloody nose. Ms. Oubre wiped off the blood with some tissue inside the master bathroom. The appellant did not tend to her injuries and yelled for her to get up and show him the text messages. Ms. Oubre was scared because this was the worst she had ever seen the appellant. Ms. Oubre gave her phone to the appellant, repeatedly told him she needed to go, and tried to leave the master bathroom. The appellant stepped in the way and prevented her

from leaving the master bathroom. When Ms. Oubre tried to push past, the appellant pushed her back, hit her a few times, and kicked her in the stomach. Transcript, p. 206-212 and 237-238.

Ms. Oubre was unable to physically fight back and asked for ice for her eye. The appellant told Ms. Oubre that she was not going to need to worry about her eye. Transcript, p. 212-213. The appellant told her that he had thought for a long time and they were going to die that night. The appellant was not kidding and she took his words seriously as he was totally capable of caring out his threat. Transcript, p. 213-215.

The appellant proceeded to retrieve Ms. Oubre's loaded gun from under the mattress because he knew where she kept her loaded gun. Ms. Oubre's gun was in working order. Transcript, p. 215, 219-220, and 280. The appellant then straddled Ms. Oubre as she laid on the bed, cocked the gun, and placed the gun into his mouth. The appellant asked Ms. Oubre how she was going to feel when he blew his brains out on the ceiling. She told him not to do that and tried to distract him by asking him for a cup of water or some ice for her eye. After getting her a cup of water, the appellant again straddled Ms. Oubre and placed the gun into his mouth. The appellant again asked Ms. Oubre how she was going to feel and told her it was her fault. Transcript, p. 215-218.

The appellant then proceeded to put the gun at Ms. Oubre's head. Ms. Oubre told the appellant he had never robbed his children of their mother as she tried to prevent him from taking her from her children. The appellant told Ms. Oubre that she was the biggest detriment for her children and that they would never grow up and become men with her. The appellant told Ms. Oubre that she was going to heaven or hell that night, whichever one she deserved. Transcript, p. 218-219.

After putting the gun to her head the first time, the appellant got off of her, walked over to shut and lock the master bedroom door, and walked over to shut the blinds to the master bedroom. As he did that, he repeatedly said they were both going to die that night. The appellant's actions of locking the door and closing the blinds caused her to believe that the appellant was serious and was really going to carry out his threat, and that she was going to die that night. Transcript, p. 221-222. Ms. Oubre ran for the door, but the locked master bedroom door slowed her enough to allow the appellant to grab ahold of her, push her against the wall, and cause her to fall to the ground. The appellant proceeded to violently beat and kick her as she coiled up into a ball. Transcript, p. 222-223.

The appellant's violent beating and kicking of Ms. Oubre appeared to allow the appellant to release his rage. The appellant proceeded to tell

Ms. Oubre to get into bed and again straddled her. Ms. Oubre was prepared to do anything to calm the appellant down because she believed he was going to kill her. She unzipped her cover up, started stroking him, and told him that she loved him. He told her that he was in a lot of trouble because he had hurt her. She told him that she was not going to say anything and not going to do anything. She told him that she loved him and got him to lay down in bed with her. He then uncocked the gun, walked around, and sat on the side of the bed with gun in hand. She got out of bed and gave him a hug. She told him to lay down and go to sleep. She repeatedly told him that she loved him and that she was not going to get him into trouble. The appellant started to calm down and laid down in bed. Ms. Oubre proceeded to lay next to him until they both fell asleep, with the gun under his pillow, for an hour to an hour and a half. Transcript, p. 224-231.

Subsequently, Ms. Oubre woke up and knew something was wrong with her face. She rolled the appellant over with his left ear up so that he could not hear her because he can't hear well out of his left ear. She proceeded to sneak out of bed and out of the house through the mud room. She left the house without her cellphone because at some point, the appellant took her phone and threw it across the master bedroom. She was terrified because she felt if he caught her leaving, he would kill her.

Transcript, p. 231-234 and 236. The appellant and Ms. Oubre were home alone during the incident. Transcript, p. 239. She got to her car and took off as fast as she can to a hospital in Salmon Creek. Transcript, p. 234-236.

On August 8, 2015, at around 1:30 AM, Ms. Stenerson returned to the residence from work. Ms. Stenerson did not see Ms. Oubre's vehicle parked in the driveway and saw the appellant's white Toyota pickup parked in the driveway. Transcript, p. 122-129.

In the early morning of August 8, 2015, Doctor Robert Frederick Sapp worked and treated Ms. Oubre in the emergency room at Legacy Salmon Creek Medical Center. Doctor Sapp examined Ms. Oubre and found dry blood in her left nose, a tender left cheek, swelling and bruising on the lower rim of her eye socket, a small contusion to the lower back, a scrape/abrasion across the back of the right shoulder, a large contusion to the left upper arm towards the back, a contusion to the right lateral shoulder, a contusion to the right outside upper arm, a contusion to the right inside elbow, and a contusion to left upper breast. X rays and a CT scan were taken of Ms. Oubre. The CT scan was done at 2:43 AM and it showed Ms. Oubre had a fractured left eye socket with a downward collapse of the rim of bones around the edge of her left eye. Transcript, p. 111-118 and 120. Orbital fractures usually do not occur from typical falls

and are usually caused by more direct blows such as an elbow or a punch or hitting something directly onto that socket. Transcript, p. 119-120. The hospital called the police. Transcript, p. 118.

On August 8, 2015, Deputy Riley McNeal responded to the hospital to speak with Ms. Oubre about her injuries. Transcript, p. 236-238. From 2:38 AM to 5:17 AM, Deputy McNeal spoke to Ms. Oubre about her ordeal. Ms. Oubre appeared scared as she detailed the events and provided Deputy McNeal with her cellphone number, house number, and the appellant's cellphone number. Transcript, p. 239 and 438-440.

On August 8, 2015, around 8:00 AM, the Cowlitz County Sheriff's department contacted Ms. Ramsey and Ms. Stenerson to evacuate them from Ms. Oubre's residence for their protection. Transcript, p. 122-129. At approximately 9:05 AM, deputies drove to Ms. Oubre's residence to initiate contact with the appellant. The appellant's white Toyota pickup was parked in the drive way. Transcript, p. 339, 342, 354, 364, and 441.

Deputies surrounded the house and tried to get the appellant to exit the residence. Transcript, p. 332-334, 338, and 343-359. Deputy Garratt Spencer noticed the residence had 3 sliding glass doors and of the three, only the one for the master bedroom had its blinds closed. Transcript, p. 375-376 and 380. Deputy McNeal made numerous calls to Ms. Oubre's cellphone, the house phone, and the appellant's cellphone for the appellant

to exit the residence. The appellant heard the calls, but did not answer them. Transcript, p. 250, 344-347, and 551. Deputy Spencer made several PA announcements for the appellant to exit the residence. The appellant did not respond to the PA announcements. Transcript, p. 338 and 374-375. During the PA announcements, Deputy Landon Jones noticed the light in the master bedroom was on. Transcript, p. 365-368.

When the appellant did not respond to the telephone calls and PA announcements, deputies breached, entered, and secured most of the residence. The only area not secured by deputies was the master bedroom and master bathroom as the door to the master bedroom was closed and locked. Deputies knocked on the master bedroom door, but the appellant did not answer. Transcript, p. 350-359. After the residence was breached, Deputy Jones noticed the light in the master bedroom had turned off, indicating someone was inside the master bedroom. Transcript, p. 365-368.

Subsequently, deputies deployed a SWAT robot into the master bedroom and saw the appellant throwing something on top of the robot to cover up the robot's cameras. Deputies made PA announcements through the robot for the appellant to exit the room, the appellant did not comply and retreated further back into the master bathroom and out of view of the deputies. Deputies then bluffed and told the appellant that they were going

to deploy a canine into the room causing the appellant to respond and surrender himself. Transcript, p. 376, 411-415, and 431. The appellant was taken into custody at 11:40 AM, about 2 hours and 40 minutes after the deputies' initial contact attempts with the appellant. Transcript, p. 354 and 364.

Inside the master bedroom, deputies found the blinds were closed to the sliding door and a ripped bra recently placed on a shelf. Transcript, p. 380-382 and 445. Inside the master bathroom, deputies found bloody tissues in the trash can and a melted ice pack in the sink. Transcript, p. 383-386 and 445. Inside the water tank to the toilet, deputies found Ms. Oubre's loaded gun. The loaded gun was recently placed inside the toilet water tank. Transcript, p. 387-390 and 445-447. The appellant had placed some figurines atop the toilet water tank lid, making it less likely for deputies to search the toilet water tank. Transcript, p. 447-448. Ms. Oubre did not store her gun in the toilet water tank. Transcript, p. 240 and 299. The appellant has 2002 felony convictions for (1) unlawful imprisonment domestic violence and (2) unlawful possession of a firearm in the second degree in Cause # 02-1-0235902. Transcript, p. 581.

Deputies subsequently interviewed the appellant regarding the evening of August 7, 2015. The appellant indicated that he had drank too much that evening and only remembered wrestling with Ms. Oubre for his

keys and wallet as he tried to leave her residence, falling to the floor as a result of the wrestling, and blacking out. The appellant claimed to have no recollection of the events described by Ms. Oubre, Transcript, p. 537-551 and 611. The appellant did not deny and did not claim that Ms. Oubre had lied about the events of January 2015 and August 7, 2015. The appellant's defense at trial was involuntary intoxication. Transcript, p. 592-644 and 670-674.

On December 6, 2015, Cowlitz County Superior Court Judge Michael Evans presided over the appellant's jury trial. Transcript, p. 3-758. The State filed a third amended information charging the appellant with Count I: Assault In The Second Degree Domestic Violence With Firearm Enhancement for the appellant assaulting Ms. Oubre with the firearm, Count II: Assault In The Second Degree Domestic Violence for the appellant punching and fracturing Ms. Oubre's eye socket, Count III: Unlawful Possession Of A Firearm In The Second Degree for the appellant possessing Ms. Oubre's loaded gun, and Count IV: Felony Harassment Domestic Violence With Firearm Enhancement for the appellant threatening to kill Ms. Oubre. Transcript, p. 649.

At trial, the court admitted the appellant's statements to deputies and his videotaped interview because he was advised of his Miranda rights, was advised that his interview was being recorded, voluntarily

waived his Miranda rights, voluntarily spoke to deputies, and consented to the recording of his interview. Transcript, p. 39-57 and 315-327.

At trial, the court conducted a 404(b) hearing and admitted the January 2015 incident into evidence because the January 2015 incident was relevant to a material issue in Count IV, Ms. Oubre's reasonable fear that the appellant would carry out his threat to kill her. Transcript, p. 58-83. The court gave a limiting jury instruction to the jury regarding the 404(b) evidence. Transcript, p. 694. The court excluded evidence of all events subsequent to August 8, 2015, between Ms. Oubre and the appellant because events after August 8, 2015, were irrelevant and muddied the waters. Transcript, p. 58-83. The appellant posted bail on August 20, 2015, contacted Ms. Oubre in violation of a no contact order, went on trips with Ms. Oubre, and became engaged to Ms. Oubre on a trip on September 5, 2015. Transcript, p. 59, 64-65, 70, 72-73, and 75-76. Subsequent to August 8, 2015, the appellant was charged and pled guilty to violating a no contact order protecting Ms. Oubre from the appellant. Transcript, p. 59, 64-65, 70, and 72-73.

After deliberations, the jury found the appellant guilty of Count I: Assault In The Fourth Degree, a lesser included of Assault In The Second Degree charge, Count II: Assault In The Fourth Degree, a lesser included of Assault In The Second Degree charge, Count III: Unlawful Possession

Of A Firearm In The Second Degree, and Count IV: Felony Harassment Domestic Violence without Firearm Enhancement. Transcript, p. 752-756. On December 22, 2015, the court sentenced the appellant on the above convictions. Transcript, p. 759-770. On January 5, 2016, judgment was entered on the appellant's case. Transcript, p. 771-772.

The appellant now appeals his convictions on the basis that the trial court abused its discretion in excluding evidence of events that transpired after August 8, 2015, and challenges the trial court's imposition of mandatory financial fees.

IV. ARGUMENTS

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING IRRELEVANT AND UNDULY PREJUDICAL EVIDENCE OF EVENTS THAT TRANSPIRED AFTER AUGUST 8, 2015.

Appellate courts review the trial courts' decisions to admit or exclude evidence under an abuse of discretion standard. State v. Swan, 114 Wash.2d 613, 658 (1990) and Reese v. Stroh, 128 Wash.2d 300, 310 (1995). In keeping with the right to establish a defense, "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." State v. Hudlow, 99 Wash.2d 1, 15 (1983). The threshold issue for admission of any evidence is relevancy. Only relevant evidence is admissible. ER 402. "Evidence is relevant if it has a tendency

victim's child and (2) the testimony of a witness who heard the victim say she was raped by another man on another occasion. Id. at 867-869. The trial court excluded the paternity test because it was not relevant and evidence that the victim had sexual relations with another man should not be admitted. Id. at 870. The trial court excluded the alleged statement by the victim of having been raped by another person on another occasion because the accusation was remote in time, was not made to a law enforcement officer, could not be proved false, would not be helpful and would simply confuse the jury, and was an impeachment on a collateral issue. Id. at 868.

In Harris, the appellate court found the trial court did not abuse its discretion in excluding the paternity test. Id. at 870-871. The paternity evidence was not relevant and would simply have invited "the defense to besmirch the character of the victim and to put her on trial instead of the defendant." Id. at 870. The appellate court found the trial court did not abuse its discretion in excluding the victim's allege statement of having been raped by another person on another occasion because "[g]enerally, evidence that a rape victim has accused others is not relevant and, therefore, not admissible, unless the defendant can demonstrate that the accusation was false." Id. at 872. The defendant conceded that he had no evidence that the prior accusation was false. Id. at 872. Furthermore, the

victim denied making the statement, thus, evidence of the alleged statement was inadmissible under ER 608 to impeach the victim's general character for truthfulness. Id. at 872-873. The defendant's conviction was affirmed. Id. at 873.

In State v. Rice, 48 Wash.App. 7 (1987), the defendant was charged and convicted of second degree burglary. Id. at 10. At trial, the defendant testified that the victim made up the burglary because the defendant had swindled the victim in a drug deal. Id. at 9. Prior to trial, the court excluded evidence that the victim allegedly assaulted and abducted friends of the defendant's brother as retaliation for the defendant swindling the victim in a drug deal because the evidence was irrelevant and any potential relevance was far outweighed by its prejudicial effect. Id. at 10.

In Rice, the appellate court found the trial court did not abuse its discretion in excluding evidence that the victim allegedly assaulted and abducted friends of the defendant's brother because (1) the evidence could have inflamed the jury and elicited an emotional response against the victim for committing the alleged assault and abduction, (2) the evidence could have confused the issues by focusing the jury's attention on the assault and abduction and away from the burglary, and (3) the probative

value of this evidence was minimal. Id. at 12-13. The defendant's conviction was affirmed. Id. at 14.

In State v. Perez-Valdez, 172 Wash.2d 808 (2011), the defendant was charged and convicted of one count of second degree rape of a child and one count of third degree rape of a child of two adopted children. Id. at 813. At trial, the defendant denied the allegations and "his defense was centered on a theory that the girls were lying." Id. at 854. At trial, the defendant's sought to introduce evidence that the victims "committed arson at a subsequent foster home to show that the girls were willing to take extreme actions to be removed from homes where they did not like the rules, potentially lying about rape." Id. at 811. The trial court excluded evidence pertaining to the subsequent arson because it was overly prejudicial and pertained to a collateral issue. Id. at 812.

In Perez-Valdez, the Washington Supreme Court found the trial court did not abuse its discretion in excluding evidence of the subsequent arson because the excluded evidence dealt with a collateral issue and was too remote and unduly prejudicial. Id. at 814-817. "It is of legitimate concern that the arson was too removed from a false accusation of rape to necessarily be considered evidence of motive to lie." Id. at 816. The defendant's conviction was affirmed. Id. at 820.

In the present case, the trial court did not abuse its discretion in excluding evidence of events subsequent to August 8, 2015, between Ms. Oubre and the appellant because the evidence was irrelevant. At trial, the appellant testified to blacking out and having no recollection of him assaulting and threatening Ms. Oubre on August 7, 2015. Ms. Oubre testified to the appellant assaulting and threatening her on August 7, 2015. The appellant did not deny and did not claim Ms. Oubre had lied about the events of August 7, 2015.

One of the main issues at trial was Ms. Oubre's reasonable fear that the appellant would carry out his threat to kill her on August 7, 2015. The trial court properly permitted Ms. Oubre to testify to (1) the January 2015 incident, which the appellant did not deny at trial and does not claim was wrongfully admitted into evidence on appeal, and (2) her ordeal of being assaulted and threatened by the appellant on August 7, 2015. Ms. Oubre testimonies about events leading up to and concerning August 7, 2015, was relevant for the jury to access her reasonable fear, the appellant does not challenge the trial court's admission of this evidence.

Events subsequent to August 8, 2015, are not relevant as they transpired after the appellant assaulted and threatened Ms. Oubre on August 7, 2015. The appellant did not deny and did not claim Ms. Oubre had lied about the events of August 7, 2015. Therefore, evidence of her

interactions with the appellant after August 8, 2015, is not relevant impeachment evidence because his defense was involuntary intoxication and not that she had a motive to lie about the events of August 7, 2015. The appellant did not deny events of August 7, 2015.

Furthermore, Oubre testified that the appellant was wonderful 95% of the time and dangerous 5% of the time. The fact that the appellant did not assault and did not scare Ms. Oubre, when he was wonderful 95% of the time, is not evidence disproving he assaulted and scared Ms. Oubre on August 7, 2015. The fact that Ms. Oubre enjoyed being with the appellant 95% of the time, when he was wonderful, is not evidence disproving she was assaulted and scared of the appellant on August 7, 2015. Ms. Oubre's interactions with the appellant after August 8, 2015, are not evidence disproving the appellant had assaulted her and she was in reasonable fear of the appellant on August 7, 2015. Therefore events subsequent to August 8, 2015, were correctly excluded because they were irrelevant for determining Ms. Oubre's reasonable fear on August 7, 2015. Evidence that a defendant had previously bought and paid for goods at a store is not relevant evidence that the defendant did not intend to shoplift at a later date. Likewise, evidence that a defendant subsequently bought and paid for goods at a store is not relevant evidence that the defendant previously did not intend to shoplift at an earlier date.

In addition to being irrelevant, events subsequent to August 8, 2015, were properly excluded because they were unduly prejudicial. The appellant was excluded from introducing events that transpired about a month after August 7, 2015. Those events were remote in time and touched on a collateral issue. The appellant did not claim Ms. Oubre lied about the events of August 7, 2015. The defense at trial was involuntary intoxication. Therefore, evidence of her being with the appellant subsequent to August 8, 2015, was not intended to impeach her motive to lie, but was intended to besmirch her character and put her on trial for her dating life instead of the appellant's assaults and threats. The admittance of that evidence would have muddied the case because (1) the evidence could have inflamed the jury and elicited an emotional response against the victim for her dating life, which included her having an affair with the appellant and her going back to appellant after he assaulted and threatened her, (2) the evidence could have confused the issues by focusing the jury's attention on her decision to be with the appellant after August 8, 2015, rather than the appellant's actions on August 7, 2015, and (3) the evidence had no or little probative value. Therefore the trial court did not abuse its discretion in excluding evidence that transpired subsequent to August 8, 2015, because such evidence was irrelevant and unduly prejudicial. The appellant was not denied his right to present his defense of involuntary

intoxication when the trial court properly excluded the irrelevant evidence that transpired after August 8, 2015.

2. THE TRIAL COURT WAS NOT REQUIRED TO CONSIDER THE APPELLANT'S PAST, PRESENT, AND FUTURE ABILITY TO PAY PRIOR TO ITS IMPOSITION OF THE MANDATORY VICTIM ASSESSMENT FEE AND THE MANDATORY DNA COLLECTION FEE.

It is important to distinguish between mandatory and discretionary legal financial obligations "because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." State v. Lundy, 176 Wash.App. 96, at 102 (2013). "Our courts have held that these mandatory obligations are constitutional so long as 'there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.'" Id. at 102-103. The victim assessment fee is required by RCW 7.68.035(1)(a) and the DNA collection fee is required by RCW 43.43.7541 "irrespective of the defendant's ability to pay." Id. at 103. "Because the legislature has mandated imposition of these legal financial obligations, the trial court's 'findings' of a defendant's current or likely future ability to pay them is surplusage." Id. at 103.

In Lundy, a jury found the defendant guilty of possession of a stolen motor vehicle, two counts of unlawful issuance of bank checks or drafts, and two counts of bail jumping. Id. at 100. At sentencing, neither party expressly discussed the defendant's future ability to pay legal financial obligations. The trial court imposed $2,697.82 in legal financial obligations. Id. at 100. The legal financial obligations included fees for restitution, victim assessment, and DNA collection. The court held that the victim assessment fee and the DNA collection fee are mandatory legal financial obligations that do not require the court to consider the defendant's current or likely future ability to pay for the mandatory fees. Id. at 102-103.

In State v. Kuster, 175 Wash.App. 420 (2013), a jury found the defendant guilty of second degree rape. At sentencing, the trial court imposed $800 in legal financial obligations consisting of a $500 victim assessment fee, $200 in court costs, and a $100 DNA collection fee. It appears the trial court did not consider the defendant's current or likely future ability to pay for the imposed legal financial obligations. Id. at 422. The defendant appealed the imposition of his legal financial obligations. Id. at 423. On appeal, the court noted that "[two] of the LFOs imposed by the trial court on Mr. Kuster are not discretionary costs governed by RCW 10.01.160. They are, instead, statutorily mandated financial obligations.

The $500 victim assessment is mandated by RCW 7.68.035 and the $100 DNA collection fee is mandated by RCW 43.43.7541. Neither statute requires the trial court to consider the offender's past, present, or future ability to pay." Id. at 424.

As in the Lundy case and the Kuster case, the trial court was not required to consider the appellant's past, present, or future ability to pay prior to its imposition of the mandatory victim assessment fee and the mandatory DNA collection fee. Even assuming the trial court was required to make such a determination, the trial court had sufficient evidence from the jury trial to impose the fees because it was undisputed that the appellant was a caretaker for an 80 acre farm and owned his own landscaping business for the past 30 years. The appellant was self-employed and physically able to do many of the landscaping projects by himself. His landscaping projects ranged from small to big heavy projects that involved removing 40 feet trees and moving 40 tons of rocks. The appellant worked a lot of landscaping projects in the summer of 2015 and worked a full day on August 7, 2015. The trial court properly imposed mandatory fees upon the appellant.

V. CONCLUSION

The appellant's appeal should be denied because the trial court did not abuse its discretion in excluding irrelevant and prejudicial evidence

that transpired after August 8, 2015, and properly imposed mandatory victim assessment and DNA collection fees.

Respectfully submitted this 29 day of November, 2016.

MIKE NGUYEN# 31641
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 29th, 2016.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 29, 2016 - 4:25 PM

Transmittal Letter

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Case Name: State of Washington v. Michael Ray Horn
Court of Appeals Case Number: 48489-7

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